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# A Regime for Archipelagos

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Kingston, R.I.

A REGIME FOR ARCHIPELAGOS

by

Ralph Fink, III

A Research Paper submitted to the Faculty of the Marine Affairs Department of the University of Rhode Island in partial satisfaction of the requirements for the degree of Master of Marine Affairs.

The contents of this paper reflect my own personal views and are not necessarily endorsed by the University of Rhode Island or the Marine Affairs Department.

Signature: Ralph Fink, III

24 April 1975

Abstract of

A REGIME FOR ARCHIPELAGOS

An analysis of the development of international law in the case of island States. The rights of these States to establish special juridical arrangements for their adjacent waters, and the effects of these decisions on other nations form the central theme. Any attempt at combining all the issues at stake into a single principle by LOS III appears doomed to failure. Success will be achieved by agreement on the separate issues and as a result of other actions not directly related to the problem of archipelagic States.

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# A REGIME FOR ARCHIPELAGOS

## CHAPTER I

### INTRODUCTION

In any discussion of Law of the Sea issues, one sooner or later is faced with the problem of archipelagos. These island groups<sup>1</sup> located at various distances from a mainland, or in some cases, existing alone in mid-ocean, have from time to time been a source of controversy to international law makers. Attempts have been made to define and delimit the waters included within an archipelago, but with little universally recognized success. The conflict between maritime powers who desire minimum restrictions and the developing island states who want more protection from seaborne threats (either real or perceived) are examined in this paper.

Background. Any attempt to present a complete and total picture of the archipelagic situation would require a much greater effort than this paper. However, the significant developments leading to the present day situation will be presented, along with possible directions as an outcome of LOS III.

Before proceeding any farther, it would be well to define more specifically the area of study. All archipelagos

are not the same; herein lies the basic problem. The principle or notion of an archipelago has been extended to at least three separate and distinct entities:

Coastal Archipelagos. These are islands so situated as to be considered extensions of the mainland. To accommodate these islands in International Law, we can turn to the Anglo-Norwegian Fisheries Case<sup>2</sup> as a classic example. The language of this straight-baseline system has been incorporated into the Geneva Convention on the Territorial Sea and the Contiguous Zone. Although included in a basic and general nature, it has served as a guide and starting point for dealing with coastal archipelagos.

Mainland Archipelagos. Certain large islands have "tied" to themselves other lesser islands with little or no international protest. Island nations, such as The United Kingdom, Japan, Ireland, and Cuba, have used straight baselines to tie fringing islands to themselves as the "mainland." Iceland can also be included in this group, but one must recognize that Iceland's claims are not strictly in line with an archipelagic principle, but are based on the delimitation of fishing zones.

Mid-Ocean Archipelagos. These are island groups where no single island dominates all the others. Rather, the islands are all of about equal size and are generally spread over a much greater area than in either the Coastal

or Mainland types. The consolidation of these islands into a unit by the use of straight baselines usually encompasses vast amounts of water.<sup>3</sup>

Archipelago Defined. Originally, archipelago referred to the sea studded with islands. The Greeks referred to the Aegain Sea as an archipelago. In modern times, however, this concept has been modified to address the islands within the sea. For the purposes of this paper, an archipelago is a group of islands that exist in close proximity, share geographical features, and are clustered about a center (rather than in a row).

Coastal and Mainland archipelagos are seemingly well cared for in International Law. The Mid-Ocean archipelagos with their oftentimes vast ocean areas have not received the attention they need. Island groups of this type, which are relevant to this study, are the Philippines, Indonesia, the Bahamas, and others.



## CHAPTER II

### THE JURIDICAL STATUS OF MID-OCEAN ARCHIPELAGOS

Historical Beginnings. No significant precedents concerning archipelagos are available from the Nineteenth century. The first significant mention was the Treaty of Paris of February 9, 1920. It provided in the case of Spitsbergen, that the archipelago includes a certain number of islands "together with all islands, great or small, and rocks appertaining thereto."<sup>1</sup> By a Norwegian law of 1925, the Archipelago was annexed by Norway. In this annexation however, no reference is made to the territorial sea or its limits.<sup>2</sup>

At the 33rd meeting of the International Law Association at Stockholm in 1924, the first mention of the territorial sea in connection with mid-ocean and coastal island groups was in a Report and Draft Convention presented by the Chairman, Alvarez. His draft stated that in the case of an archipelago, the islands should be considered as forming a unit, and the extent of the territorial waters should be measured from the islands situated farthest from the center of the archipelago.<sup>3</sup> This same viewpoint was espoused by Jessup<sup>4</sup> and the American Institute of International Law<sup>5</sup> in a preparatory article for The Hague Codification Conference (1930).

Even though there appeared to be some strong basis for an article dealing specifically with archipelagos prior to the conference, the discussions broke down primarily because of the inability of the participants to agree on the maximum allowable length of the connecting lines that would enclose the territorial waters of the archipelago. The words of the Committee in 1930 were: "Owing to lack of technical details, . . . the idea of drafting a definite text on this subject had to be abandoned."<sup>6</sup>

It became clear after this Conference, that no agreement would be reached without either a prior definition of the territorial waters of island groups, or in the case of "related" islands, the maximum length of baselines that could be used to join them.

Unilateral Actions. The first significant claim that delimited the waters of an archipelago was that of Ecuador concerning the Galapagos Islands.<sup>7</sup> In 1934, Ecuador declared the Galapagos a Fish and Game Preserve and National Park. In 1938 they made it a requirement for fishing boats to have a license within 15 miles of the islands.<sup>8</sup> Subsequent actions by Chile, Peru, and Ecuador in declaring a 200 nautical mile territorial sea had the effect of withdrawing a vast amount of ocean space from public use through the expansion of the existing baselines to 200 miles. This action has not drawn much international notice because of



of the remoteness of these islands.

The Philippines<sup>9</sup> attempted to obtain national status for all of the waters between their islands and extending out to a boundary line mentioned originally in the Treaty of Paris of 1898. This action dates from 1955 when the President of the Philippines informed the U.N. that waters within the baselines connecting the islands were maritime territorial waters and that the territorial sea extended to the limits described in the Treaty of Paris of 10 December 1898.<sup>10</sup> The wording of this declaration (or Note) stresses the strong economic ties that the Philippines has with the sea. The necessity to provide for security and protection of fishing rights is the key issue; innocent passage was granted to foreign vessels. Later, in 1961, a more rigid claim was made by declaring the waters within the baselines as inland or internal waters, thus eliminating the question of innocent passage.

Recent claims have stressed the historical and geographic aspects of their archipelagic claim. It has been argued that all of the islands are the tops of connected mountains beneath the sea and that the intervening water is the equivalent of inland lakes or rivers. Finally, the question of security is ever present in their archipelagic claims, not only from foreign aggression but also from smugglers and internal revolutionists.

Following the lead of the Philippines, Indonesia<sup>11</sup> declared it has special archipelagic rights in 1957 and immediately drew protest from the major maritime nations. The essence of Indonesia's claim was that the islands have always been considered as one unit and to preserve this unity it would be necessary to also include the seas between the islands as part of the sovereign territory of the state. Further action by Indonesia concerned the actual definition of passage through "internal" waters and stipulated that it had the right to suspend passage of vessels for security reasons. These actions of the late 50's have taken a slightly different slant with the recent concern over offshore minerals. Now the protection of vital economic issues is stressed whereas before it was national security.<sup>12</sup>

As a final example of unilateral action by an island group, Fiji<sup>13</sup> will be considered. Prior to 1971 there was no claim by Fiji to the waters among their islands as being unique, nor of their deserving any special classification. Early records show that legislation extended only to a three-mile limit. However, since attaining their independence, the Fijian's have taken the natural position of wanting to protect their resources. As an island state the protection of their marine environment is vital.

Archipelagic states are claiming a uniqueness that they feel must be recognized by special treaty articles. This

claim for special treatment will be reviewed in the section entitled "Draft Proposals." (Draft Proposals of articles relating to archipelagic states recently submitted to the United Nations by Fiji, Indonesia, Mauritius, and the Philippines are included in Appendix A.)

The 1958 Law of the Sea Conference. Unfortunately, there is not much that can be said on the subject of archipelagos as a result of the 1958 Convention. There were no articles dealing with island groups or archipelagos, largely as a result of lack of data. The delegates felt that they had insufficient information concerning the numerous variations that existed throughout the world. An attempt was made to include guidelines for dealing with non-coastal islands by recommending that they follow the general rules that apply to groups of islands. This suggestion was omitted because it supposedly was plainly misleading.

In summation, the 1958 Conference felt it was better to allow archipelagic states to continue to develop rules and principles as a result of evolution rather than prescribe without further study.

Emerging Nations. A heading of this nature implies a new or recently formed nation. In many cases it is the granting of independence to a former colony or the establishment of a new political regime. Along with the independence usually

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comes a strong desire for control. Unfortunately this control often must extend over the sea as well as the land territory of the new nation. By exerting itself in this manner, a new nation can perceive that it has achieved status among the major maritime nations. Its position can be improved by associating itself with other nations of a similar economic, if not geographic, situation and thus feel "strong" in its ability to delay or thwart actions proposed by economically superior countries.

It is imperative that the needs of these new nations be understood and that every effort be made to insure they receive the recognition they desire to prevent any semblance of geographic "blackmail" from occurring. The great example of American expansion westward and its effect on nature, Indians, and other countries should not be the model used by other new nations. Leaders of these nations are bound to perceive that they must exert themselves by declaring that waters adjacent to them are vital to their national interests and thus attempt to exclude all others.

This matter of new nations should not be taken lightly. One needs only to examine a map of the world to see that most independent nations of the future will be coming from the island groups, trust territories, protectorates, and island colonies that dot the oceans. Each of these will attempt to insure its survival by protecting its most abundant resource, the sea.



Draft Proposals. The two major proposals that have been tabled at the U.N. are the United Kingdom's proposal (dated August 2, 1973) and a second, by four archipelagic States, Fiji, Indonesia, Mauritius, and the Philippines (dated August 9, 1974). (These draft proposals are included in the appendix to this paper.)

The following general statements can be made concerning the draft proposals of the four archipelagic States: (1) They would permit the drawing of straight baselines between islands and outlying rocks and drying reefs to determine the extent of the territorial sea. (2) They would allow the creation of a special class of waters within these baselines. The waters would be best described as having the qualities of a territorial sea, inland waters, and the economic zone all in one. The main differences would lie in permission of innocent passage with limitations. The intricacies of the legal status of this water will be covered in Chapter III.

The United Kingdom's proposal assigns a limit of 48 nautical miles to the straight baselines used in delineating the archipelago. Further, it appears that it was written to limit the amount of control that archipelagic States could exercise over waters that have been used as routes for international navigation between one part of the high seas and another. Additionally, the ratio of the area of the sea to



the area of land territory inside the perimeter may not exceed five to one.

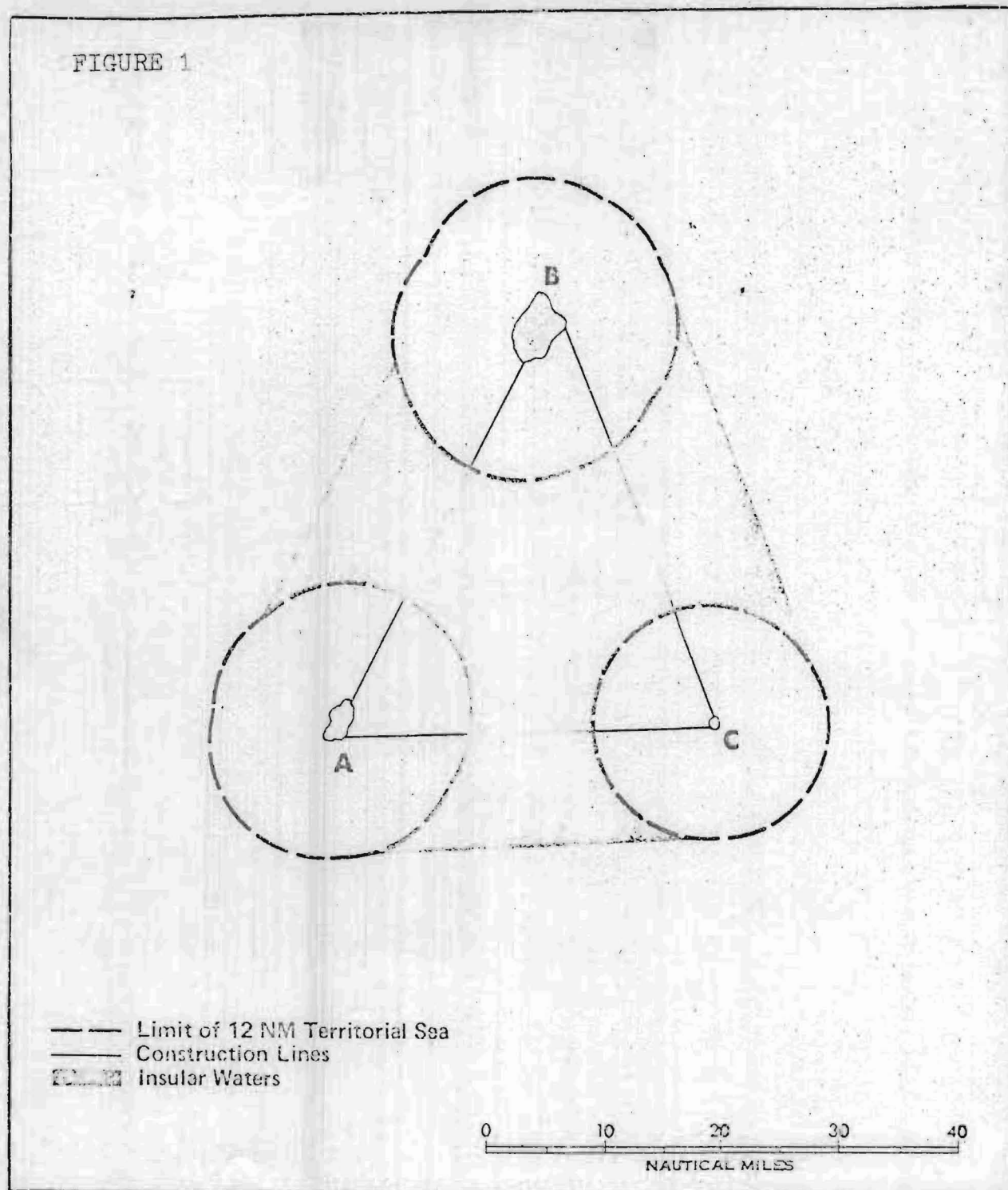
Other limited proposals were made by such nations as Ecuador, Panama, Peru, and the People's Republic of China. Their proposals were not written specifically for archipelagos, but included references as part of more general proposals on the oceans.<sup>14</sup>

Adjacency. The concept that the islands of an archipelago are so situated as to be considered a geographic unit is critical to understanding adjacency. If the islands are located a great distance from one another then they could hardly be considered adjacent. This subject of adjacency is thoroughly treated by R. D. Hodgson and L. M. Alexander<sup>15</sup> in their analysis of special circumstances. The following are some of the key conditions which they recommend:

1. Straight lines up to a maximum of forty nautical miles between adjacent basepoints. The waters enclosed by these lines would be called "insular waters," over which the country would have jurisdiction, subject to certain restrictions.
2. The straight lines would be termed "construction lines," and twelve miles seaward of these lines the outer limits of the insular waters would be delimited.

On Figure 1, the dashed line marks the outer limits of a twelve mile sea about islands (A & B) and a rock (C), while the solid line is the construction line between the three features. The shaded area indicates the extent of the insular waters. On Figure 2,

FIGURE 1



Source: Robert D. Hodgson and Lewis M. Alexander, Towards An Objective Analysis of Special Circumstances, Occasional Paper No. 13, (Kingston, R.I. : Law of the Sea Institute, 1972), p.47.

it is more than 40 miles from islands A or B to islands C or D; therefore they cannot be joined by construction lines. The islands have jurisdiction over the territorial waters out to the 12 mile limit and the insular waters.

3. Insular waters will have the same juridical status as territorial waters, except that all ships and aircraft in transit shall have the same freedoms of navigation and overflight as they have on the high seas. This is modified slightly by the ability of the State to designate lanes for transit by ships and aircraft.
4. To prevent widely scattered islands that meet the 40 mile criteria from enclosing a vast inner water, the requirement that the total area of insular waters not exceed the total area of exclusively territorial waters is imposed.

On Figure 3, the territorial waters exceed the insular. However, on Figure 4 the extent of insular waters exceeds the territorial waters and therefore could not meet the adjacency criteria.<sup>16</sup>

FIGURE 2

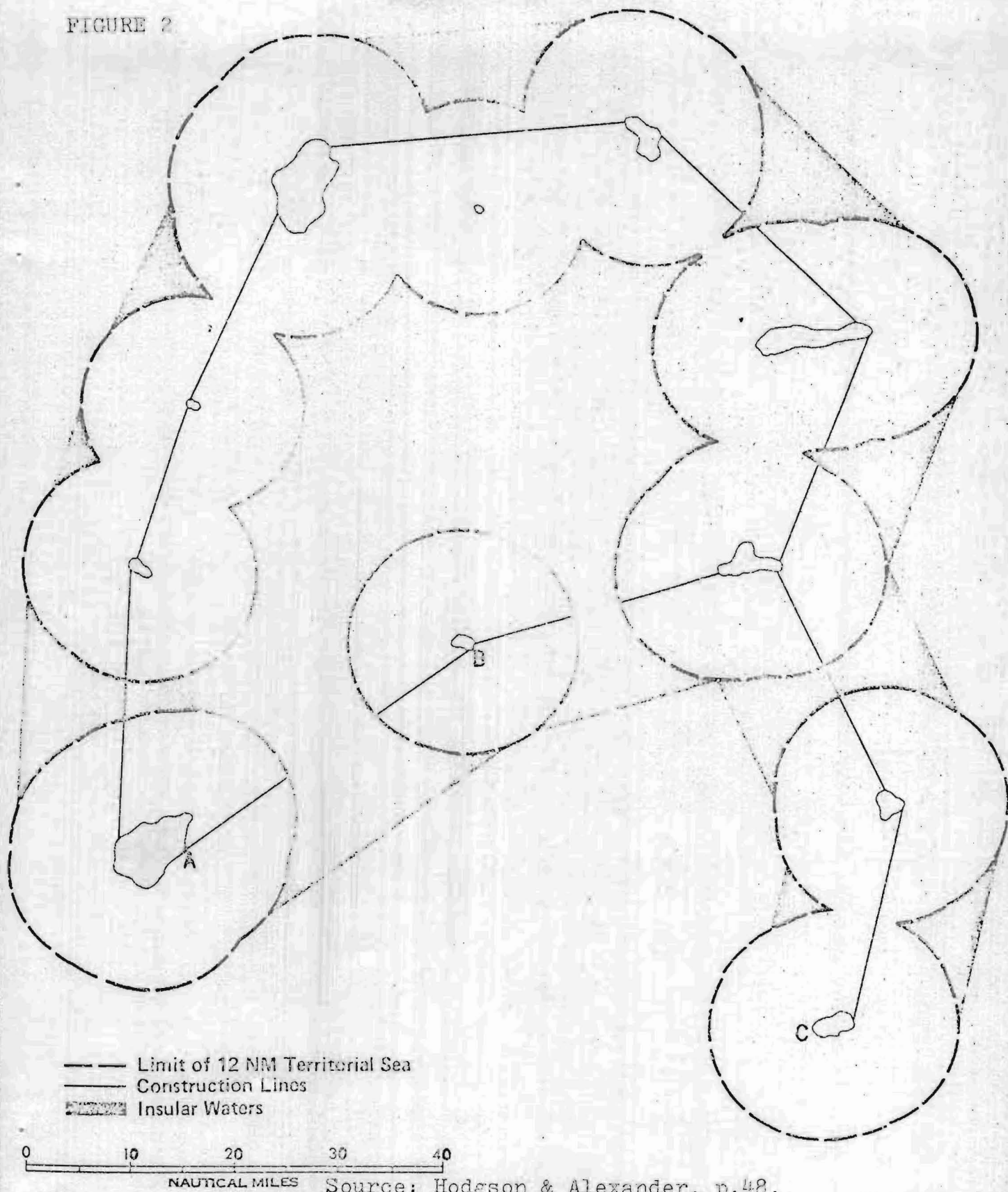




FIGURE 3

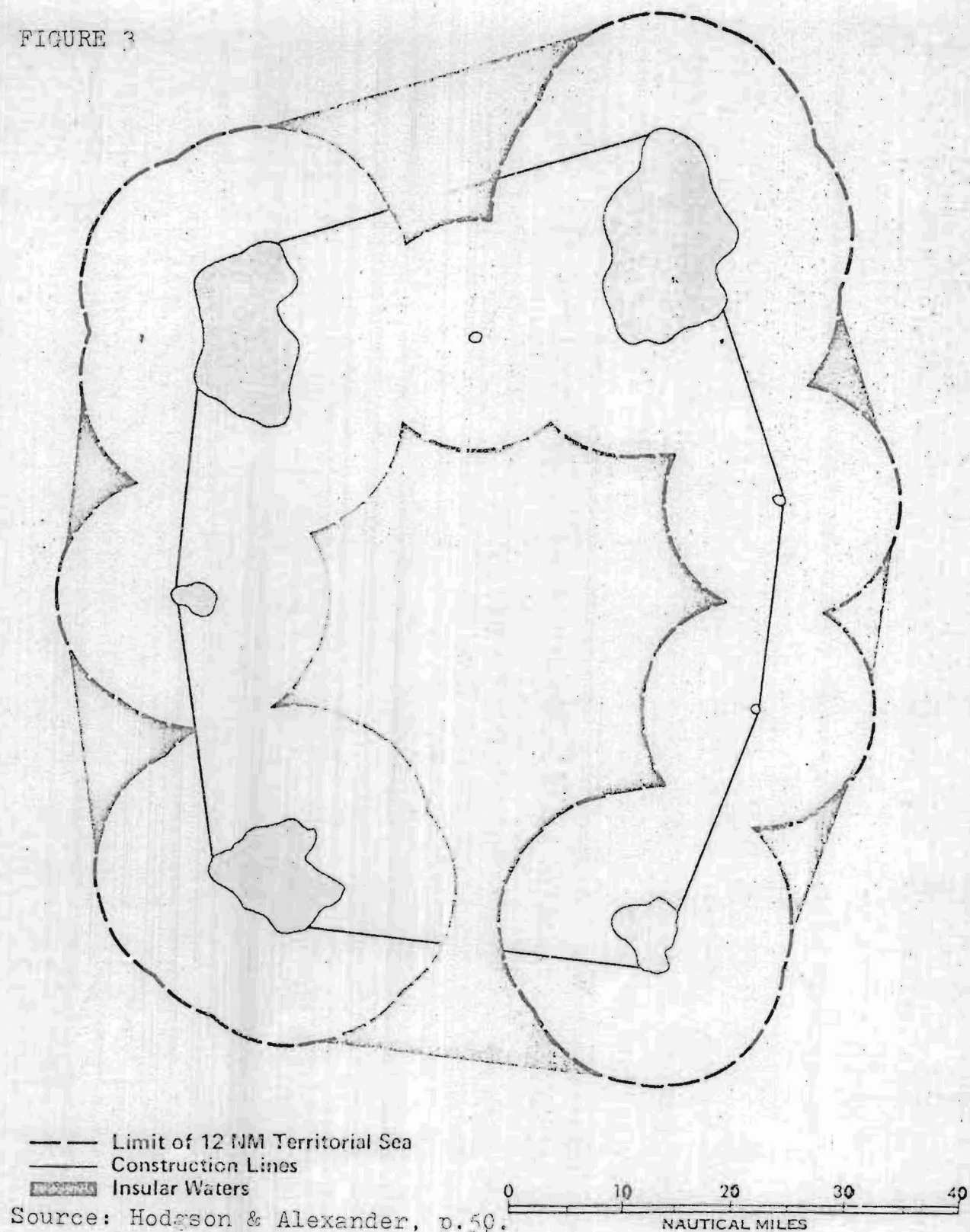
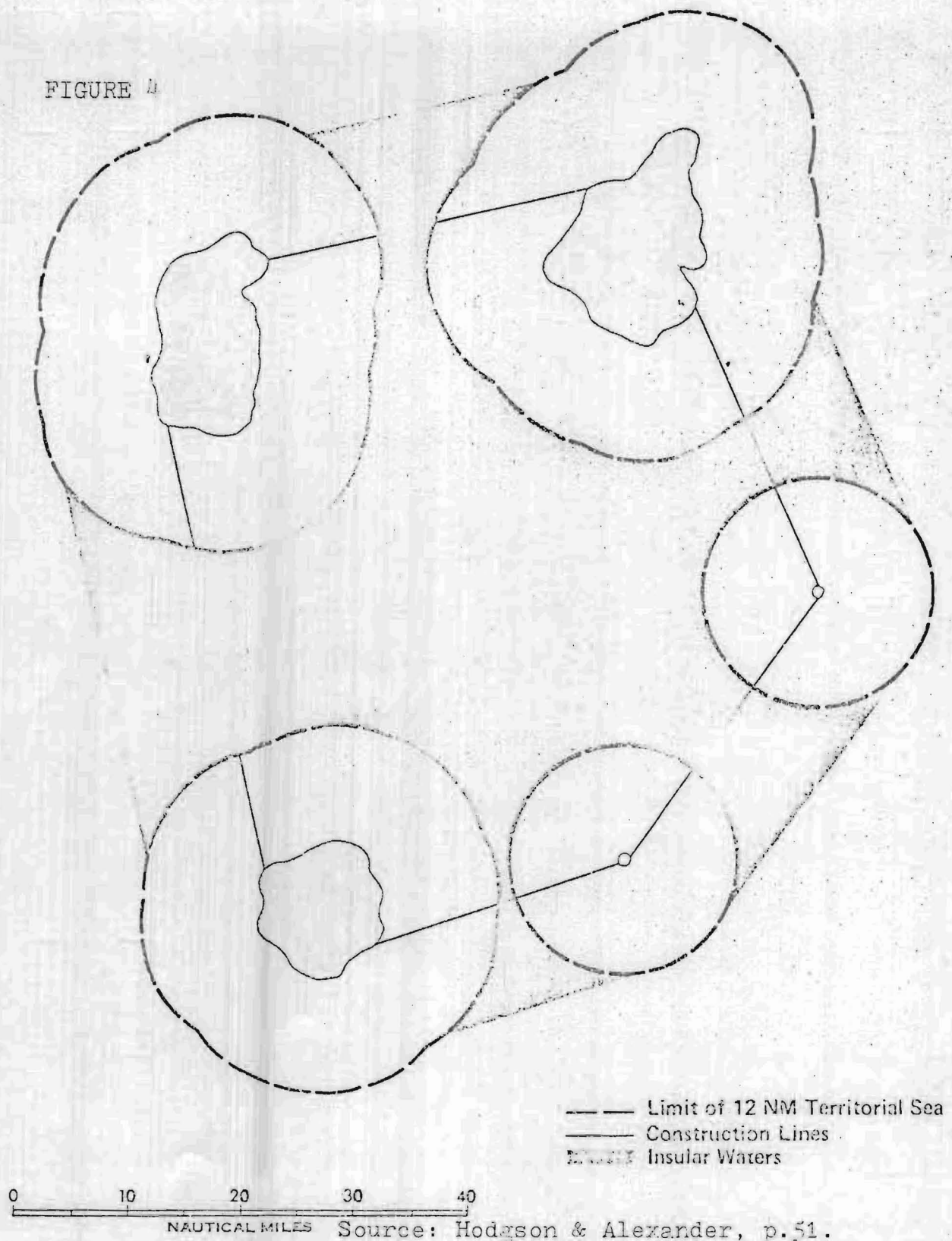


FIGURE 11





## CHAPTER III

### THE STATUS OF WATERS WITHIN AN ARCHIPELAGO

"It is clear that no consensus has evolved for any particular system of delimiting the bounds of authority over the waters of archipelagic islands."<sup>1</sup> With this quote for an introduction, the archipelagic approach to innocent passage, internal waters, historic waters, and some "new" classifications will be examined.

Innocent Passage. Articles 14 through 23 of the Territorial Sea Convention (1958) contain the existing law concerning the innocent passage of foreign vessels in the territorial sea. Although not specifically mentioned, government vessels and warships are also considered to have this right. Additionally, stopping and anchoring is also included in this right if it is incidental to ordinary navigation or required for reasons of distress. Passage is innocent so long as it is not prejudicial to the peace, good order, or security of the State. Submarines passing through the territorial sea are required to do so on the surface and to show their flag. Fishing vessels must obey the laws of the coastal State regarding fishing in order for their passage to be considered innocent.

The proposals of the archipelagic States use the

phrase innocent passage, but there is a slightly different meaning associated with it. Basically, the right is more limited in archipelagic waters than in the territorial sea. There is no right to stop or anchor, the State has the right to designate sea lanes, and the archipelagic States may prohibit warships from entering their waters.

Internal Waters. If one uses the model outlined by the Anglo-Norwegian Fisheries Case, then the waters enclosed by the baselines are internal waters. A definition of internal waters would be inconsistent with their use, for no right of innocent passage exists in internal waters.

Much of this discussion stems from a study prepared by the well-known Norwegian jurist Jens Evensen at the request of the U.N. in preparation for the 1958 Conference. He offered the following proposal for non-coastal archipelagos:

1. In the case of an archipelago which belongs to a single State and which may reasonably be considered as a whole, the extent of the territorial sea shall be measured from the outermost points of the outermost islands and islets of the archipelagos. Straight baselines as provided for under Article 5 may be applied for such delimitation.
2. The waters situated between and inside the constituent island and islets of the archipelago shall be considered as internal waters with the exceptions set forth under paragraph 3 of this article.
3. Where the waters between and inside the islands

and islets of an archipelago form a strait, such waters cannot be closed to the innocent passage of foreign ships.<sup>2</sup>

To avoid the problems associated with the use of the term "internal," and also to attempt to build a stronger case for their claims, many island States have begun to claim their waters as "historic."

Historic Waters. . . . All those authorities who have directed their attention to the problem seem to agree that historic title can apply to waters other than bays, i.e., to straits, archipelagoes and generally to all those waters which can be included in the maritime domain of a State.<sup>3</sup>

In order to establish title to "Historic Waters," there are three elements that must be considered.

1. Exercise of authority over the area.
2. Continuity of this exercise of authority.
3. The attitude of foreign States.

Sometimes a fourth item is added to this list: economic necessity or national security. The State must claim actual SOVEREIGNTY over the area; anything less is not sufficient. A claim of "historic" means that is actually a part of the maritime domain of the State. The State cannot claim it as historic because its citizens have fished there for a long time. However, if they continuously asserted that its citizens had the exclusive right to fish in the area, and had in accordance with this assertion kept foreign fishermen away from the area or taken action against



them, then, it can be said that the State exercised sovereignty over the area and its claim may be substantiated.<sup>4</sup> This sovereignty "must be effectively exercised; the intent of the State must be expressed by deeds and not merely proclamations."<sup>5</sup> The Philippines initially attempted to link their archipelagic claims to a historic right based on Nineteenth Century treaties. This action received protest from the international community and present day claims have moved away from any strong reliance on historic claims. Additionally, the fine line between diplomacy and the formulation of new international law often requires that a State refrain from using great force to prove its point, so to speak. If the nation were defending its real territory against others, one might witness the use of active naval power or mines to ensure the effective exercise of sovereignty. But, as is the case with both Indonesia and the Philippines, there is too much at stake to risk violence over a claim to historic waters.

Insular Waters. A term used by Hodgson and Alexander in their "Towards an Objective Analysis of Special Circumstances," to mean those waters lying within construction lines and having the same status as territorial waters, except that all ships and aircraft in transit shall enjoy the same freedom of navigation and overflight as they have

on the high seas. This concept has been applied to a limited number of island groups, but the effects have been minimal.<sup>6</sup>

PERSPECTIVE. Before continuing into the next major heading on archipelagos, it is necessary that some attention be given to the general trend that has occurred during the past few decades concerning the size of the territorial sea.

Throughout history, boundaries on land have been delineated by using natural features such as rivers, mountain ranges, etc. At sea, the first widely recognized boundary became the three-mile limit; generally thought of as the maximum distance a cannonball could be hurled with any accuracy. Conflicts over fishing rights, offshore islands (and perhaps the improvement of naval weaponry), have led to the establishment by some nations of broader territorial seas, or other zones of limited or complete jurisdiction. The United States, for example, has delineated a contiguous zone from three to twelve miles from shore in which it may exercise the control necessary to prevent infringement of its customs, fiscal, immigration, or sanitary laws and regulations. A nation's sovereignty over its territorial sea is not questioned, however, the breadth of the territorial sea claimed is frequently the

cause of controversy.

Figure 5 shows the trend towards expanding the territorial sea that has taken place in the last forty-five years. The majority of the claims lie between the United States' three miles and the Soviet Union's twelve miles.



FIGURE 5

COMPARISON BETWEEN THE BREADTH OF THE TERRITORIAL SEA  
AND THE NUMBER OF STATES CLAIMING JURISDICTION

BREADTH OF TERRITORIAL SEA	1929	1950	1970	1974
3 miles	15 (75%)	45 (68%)	31 (31%)	28 (26%)
3 to 12 miles	4	18	22	16
12 miles	1	3	39	54
Over 12 miles	---	---	8	19
Total countries making claims	20	66	100	117*

\* There are 121 coastal states. Four have made no specific claims.

Source: Dr. Lewis M. Alexander, Lecture Notes, Geography 571, University of Rhode Island, Kingston, Rhode Island, 12 November 1974.

## CHAPTER IV

### THE STATUS OF THE AIR SPACE OF AN ARCHIPELAGO

One of the most important claims that can be made is to freedom of flight in the airspace above the sea. This is basic and essential to all nations. The prime consideration here is reciprocity. ICAO (International Civil Aviation Organization) controls the conduct of international aviation and regulates route structures and airways. To permit the placement of navigational aids at their optimum location, these airways must occasionally enter the airspace over the territorial waters of a nation. This technical "violation" of the sovereignty of the nation's airspace is recognized as necessary to the conduct of safe flight and has become an accepted practice. The foregoing is not to imply that unwarranted overflight is a routine occurrence, but rather that when it happens, it generally does not incur any protest. A glance at Figure 6 will illustrate this point.

The draft articles of the archipelagic States make one reference to aircraft, likewise, the amendments proposed by the People's Republic of Bulgaria, the German Democratic Republic, and the Polish People's Republic include the airspace over the archipelagic waters in their definitions.

Regardless of the final decision concerning the status

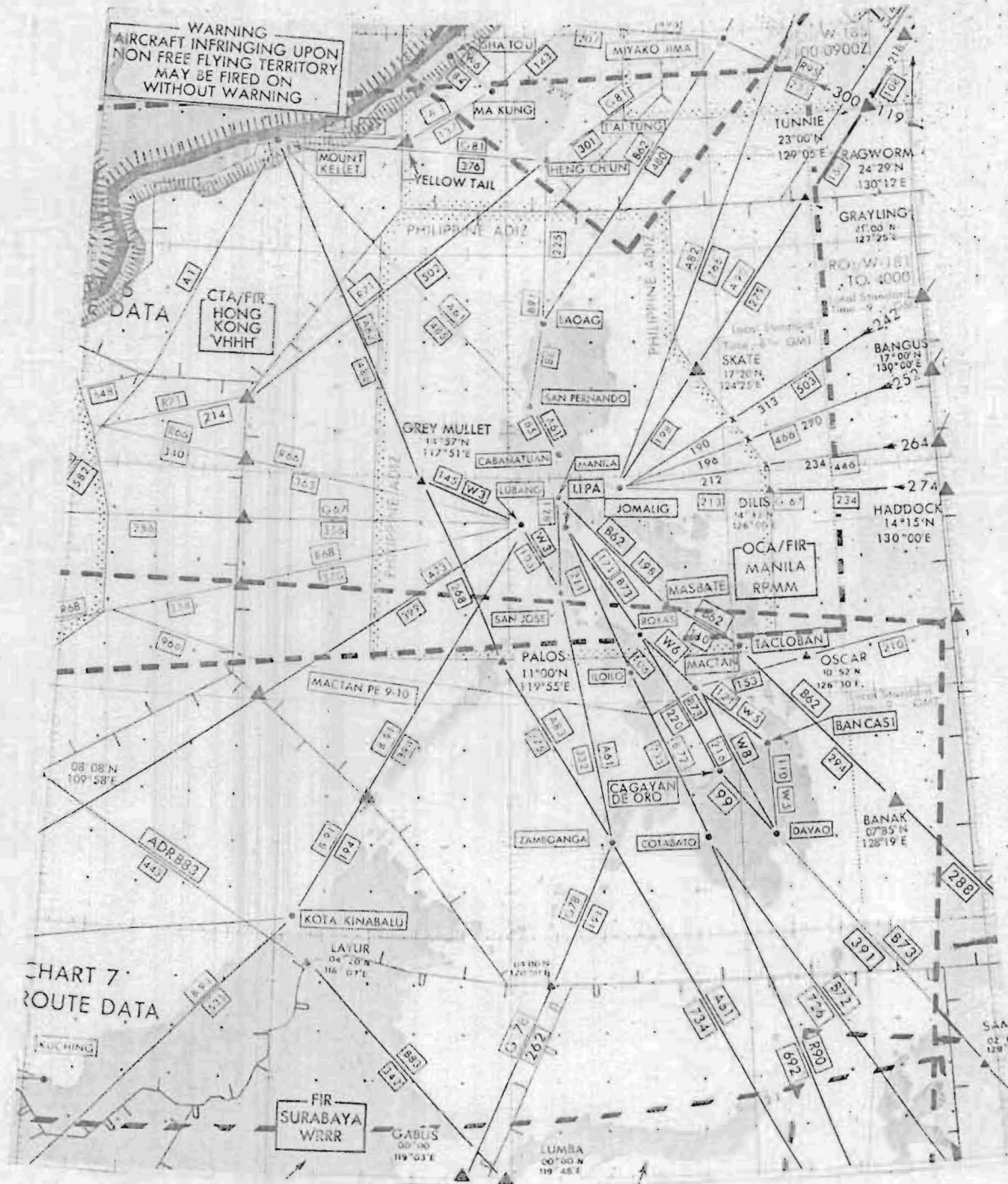
of archipelagic waters, it is felt that the matter of civil aviation will be dealt with separately. Rapid identification means coupled with relatively inexpensive equipment make it unlikely that a nation would restrict civil aviation because of a perceived threat to its sovereignty (or for any other reason).

Inexpensive long-range radar, IFF (Identification, Friend or Foe), and a well established air route structure put civil aircraft in a place by themselves. Blanket approvals for airway use by civil aircraft are routinely negotiated and not likely to be affected by the outcome of LOS III.

Military aircraft, because of their very nature, require advance approval to enter another country's airspace, unless it's an emergency. Even in a declared emergency, the aircraft may be intercepted and tracked as "hostile" (in some cases) until landing. Additionally, numerous reports and messages are required immediately after the termination of the emergency.

FIGURE 6

## ENROUTE AIRWAYS CHART OF THE PHILIPPINES AND SURROUNDING AREA





## CHAPTER V

### THE CASE FOR AN ARCHIPELAGIC REGIME

The Geographic Approach. Before beginning, one must realize that if you go deep enough into the ocean (or earth), you will find that all things are connected. However, a rationale for classifying island groups and perhaps structuring them within a framework may exist in a purely geographic or geophysical approach. If international agreement can be reached on the geographical features that define an archipelago, then perhaps the application of territorial claims to the seas will proceed in a more ordered manner. The following factors might be among those considered in attempting a classification of this nature:

1. A Separate Geographical Entity. Island groups that are not merely extensions of the mainland may be either the tops of volcanic mountains, such as the Fiji Islands, or separate and distinct land masses with their own mountain ranges, rivers, and volcanoes, such as the Philippines. This definition of a "separate geographical entity" is itself a difficult concept. One must view the islands as from above and ask, Do they exist by themselves? A "yes" or a "qualified yes" means they should at least be considered for archipelagic status.

2. More Than Twelve Miles From A/The Mainland.

This is expanded to mean that the island group does not exist in what might be classified as a semi-enclosed sea or historic bay. Inclusion under one of these regimes would eliminate it from the archipelagic question.

3. Non-Linear Arrangement. The islands may exist in a line if there is more than one row. The Tuamotu Islands in the South Pacific and the Solomons off New Guinea are examples of this type. Islands which appear as "stepping-stones," e.g., the South Sandwich Islands off the coast of Argentina are clearly an example of a linear group of islands with no claim to archipelagic status.

4. Disregard Anthropogeographic<sup>1</sup> Claims. Archipelagic classification should be done on a purely geographic basis. Once archipelagic status is determined, accepted international procedures for boundary definition may take place. Lack of agreement over water or land boundaries within an island group that is by definition of an international convention "an archipelago" will be resolved at the national level.

Perhaps by looking at the situation in this purely physical sense and using computer mapping techniques, a world map of archipelagos could be drawn without regard to any existing boundaries. Such a map might show that Indonesia is not a large archipelago, but a nation of smaller archipelagos and islands. Armed with a uniform

and rational proposal based on physical features, not subjective concepts, the archipelagic question may be resolved.

Historical and Economic Factors.<sup>2</sup> The presence of a large number of islands is favorable for the concentration of food and hence the waters may be particularly rich in fish. Such is the case for both the Philippines and Indonesia who depend heavily upon the sea for their protein. The inhabitants of these islands have always used the waters between their islands for communication and as a source of food. For the most part, they use very simple gear and primitive boats and nets. Their take per individual is low, but there are millions of people engaged in fishing. It is the fear of competing with the more advanced fishing countries and their huge mechanized fleets that generates much of the pressure for more archipelagic rights.

Island nations point to the long usage of the waters between their islands by their inhabitants as the grounds upon which to grant them special rights and privileges. Spokesmen such as Mochtar Kusumaatmadja of Indonesia are able to generate much feeling and compassion for the island peoples when they describe the conflict between modern fleets and the "praus carrying copra, which they sell for a few dollars"<sup>3</sup> that occur on the waters in and around Indonesia.

The argument against historical and economic considerations hinges on the fact that other nations also have a stake in the waters that are being claimed by the island nation. Claims by a geographically divided country are analogous to the United States claiming control of the area between the U.S. and Hawaii.<sup>4</sup>

A Special Circumstance. It is argued that perhaps archipelagos are so unique that they should have a regime created specially for their needs. The fact that they are both similar to coastal archipelagos and also uniquely different when viewed from the position of the maritime power, precludes a simple solution to the problem. It is this difficulty in finding a "simple" solution that prompts the suggestion that maybe an overall answer won't be found. Having examined the reasons why a regime for archipelagos might be desired, let us now look at reasons why one may not be necessary or desirable.



## CHAPTER VI

### THE CASE AGAINST A SPECIAL REGIME

Most of the material available concerning a regime for archipelagos has been presented by proponents stressing the need for economic protection. In recent years the favorable publicity afforded the proposed 200 nautical mile economic zone and the strong possibility that it will become part of international law has forced the archipelagic States to change their attitudes. Now, they stress the need for security as the basis for special consideration. Their efforts seem to be aimed primarily against warships. If this is the case, then perhaps a special regime is not the answer, but rather a proposition that the "intervening waters of the islands be considered a zone from which warships could be excluded at coastal discretion."<sup>1</sup> Expanding this line of reasoning to include the use of sea-lanes within the archipelago might prove to be the ultimate solution.

Attempting to design an archipelagic principle that would encompass the somewhat divergent views of Indonesia and the Philippines, as the two major archipelagic nations, is a monumental task. Not only have Indonesia and the Philippines confronted the maritime nations about passage through their waters, but also each other! In a sense, passage through the Philippine and Indonesian straits involves passage from the

high seas to the high seas; but, the straits both start and end in waters that are claimed to be internal or "archipelagic." The Indonesian authorities will privately concede that foreign shipping has the right to pass through these waters provided they follow certain "guidelines." The Philippines, on the other hand, refuse to make this concession and stress that they have complete sovereignty over their waters. Neither nation will relax its stated position to a more middle ground. With this kind of controversy existing, it is easy to see why the problem of archipelagos has not been settled in past Law of the Sea conferences.

An interesting situation concerning the passage of warships through the territorial sea has developed in connection with the waters of an archipelago. It is the United States position that warships are included as "ships of all States" in Article 14 of the Convention on the Territorial Sea and the Contiguous Zone and therefore have the right of innocent passage through the waters in question. Requests from Indonesia and the Philippines for prior notification of passage are given cursory attention. This status quo has existed for some time with little protest from either side.

Outcomes of LOS III are likely to include an expanded territorial sea, a universally recognized economic zone of extended width, and perhaps additional regulations governing straits.

It is felt that the combination of these three universally agreed upon items will adequately provide for the needs of archipelagic States. The need for a special regime may be obviated.

## CHAPTER VII

### CONCLUSIONS

Having examined the historical beginnings of the archipelagic situation, it can be concluded that international law in the case of archipelagos has not advanced beyond 1958. In their quest for international recognition and national unity, the archipelagic States have found themselves opposed by most of the major maritime powers. Through unilateral actions and attempted proposals at conferences, they have tried to achieve recognition of their unique situation. Unfortunately, each archipelago is so unique in itself that a generally acceptable solution or principle has not been found.

Many of the rights claimed by archipelagic States may soon be realized through other actions of the Third Conference on the Law of the Sea. Protection of economic interests may come about through passage of the proposed 200-nautical mile economic zone. Territorial sea claims may require separate consideration and the approval of baselines of up to 48 nautical miles in length. It is felt that by separating the parts of the archipelagic question a more universally acceptable compromise can be found. Once the question of territorial sea is answered, then the remaining waters (which will in most cases be included in an economic



zone) may be termed archipelagic, or insular, and the question of transit or passage be decided.

Sea-lanes will probably be the answer selected in the compromise solution. Free transit of all ships will be permitted in the sea-lanes with prior permission or at the least, prior notification, required to use the "archipelagic" waters outside the lanes.

Once the preceding problems are solved, then a general statement on archipelagos may be made and incorporated as a part of international law.

## NOTES

### Chapter I

1. "The difference between 'island groups' and 'archipelagos' has never been clearly spelled out. Presumably in archipelagos the islands exist in some form of physical proximity with one another.---But no generally accepted list of island groups and of archipelagos of the world yet exists." From Lewis M. Alexander, "Indices of National Interest in the Oceans," Ocean Development and International Law Journal 1973, Vol. 1, Number 1.

2. Anglo-Norwegian Fisheries Case, Judgment of Dec. 18, 1951, I.C.J. Rep. 116, Sanctioned the Norwegian claim to the use of straight baselines which follow the general direction of the coast.

3. The subject of straight baselines is covered quite thoroughly by Alexander and Hodgson in Occasional Paper No. 13; Towards an Objective Analysis of Special Circumstances, page 23: "In discussing the reasons for drawing of straight baselines, the International Court of Justice stated that one must consider the "close dependence of the territorial sea upon the land domain for it is, after all, the land which gives to the state rights to the adjacent sea." Noting certain criteria, the Court cited their lack of precision but insisted that they do provide courts with an adequate basis which can be adapted to the diverse facts in question. Unfortunately, the straight baseline adaptations have been many and varied and the results often quite confusing. There should be, however, a way to make the meaning of the court more precise, to quantify the values so to speak. The three specific qualifications which a straight baseline had to meet, according to the Court, were:

1. /straight/ "baselines must not depart to any appreciable extent from the general direction of the coast."
2. They must enclose sea areas which "are sufficiently closely linked to the land domain to be subject to the regime of internal waters."
3. "Finally, there is one consideration not to be overlooked...that of certain economic interest peculiar to a region, the reality and importance of which are clearly evidenced by long usage."

## Chapter II

1. C. John Colombus, The International Law of the Sea, 3rd ed., (London: Longmans, Green, 1954), p. 91.
2. U.N. Conference on the Law of the Sea, 1958, Official Records, Vol. 1, p. 298.
3. D. P. O'Connell, "Mid-Ocean Archipelagos in International Law," The British Year Book of International Law, 1971, (London: Oxford University Press, 1973), p. 5.
4. Philip Caryl Jessup, The Law of Territorial Waters and Maritime Jurisdiction (New York: G. A. Jennings, 1927), p. 457. "In the case of archipelagos, the constituent islands are considered as forming a unit and the extent of territorial waters is measured from the islands farthest from the center of the archipelago."
5. American Journal of International Law, Spec. Suppl. 24, 1930, p. 34.
6. Second Sub-Committee on the Territorial Sea, L. N. Doc. C. 341(b), M.145(b), 1930 v. 16, p. 219.
7. The Galapagos Islands total 3,024 square miles and lie between 600 and 700 miles of the coast of Ecuador. Its Ecuadorian name is the Archipelago of Columbus (Archipelago de Colon). It consists of six large islands and about 60 smaller ones, scattered over 23,000 square miles of ocean
8. O'Connell, p. 23.
9. The Philippines consists of approximately 7,100 islands. Only 357 of which have areas that exceed one square mile. It lies between 21° 25' and 4° 23'N (a distance of 1,150 miles) and 116° and 127°E (a distance of 660 miles).
10. U.N. Doc. A/2934, 1955, p. 52-53.
11. Indonesia consists of five large islands and more than 3,000 small ones forming an arc reaching from 95° to 135°E (about 3,125 miles) and from 6°N to 11°S (about 1,250 miles).
12. See Mochtar Kusumaatmadja, "The Legal Regime of Archipelagoes: Problems and Issues," Proceedings of the Seventh Annual Conference of the Law of the Sea Institute, Lewis M. Alexander, ed. (Kingston, R.I.: University of Rhode Island, 1973), p. 166-172.



13. Fiji comprises more than 300 islands (106 of them uninhabited), scattered over 95,000 square miles of sea, between 15° and 22°S and 177°W and 175°E.
14. For greater detail on these other limited proposals see C. F. Amerasinghe, "The Problem of Archipelagoes in the International Law of the Sea," The International and Comparative Law-Quarterly, Vol. 23, Part 3, July 1974, p. 546-547.
15. Robert D. Hodgson and Lewis M. Alexander, Towards an Objective Analysis of Special Circumstances, Occasional Paper No. 13, Law of the Sea Institute, Kingston, R.I., April 1972, p. 45-46.
16. Ibid., p. 49.

### Chapter III

1. M. S. McDougal and W. T. Burke, The Public Order of the Oceans (New Haven and London: Yale University Press, 1962), p. 418-419.
2. Jens Evensen, "Certain Legal Aspects Concerning the Delimitation of the Territorial Waters of Archipelagos," Doc. A/Conf. 13/10 (1958), p. 30.
3. Juridical Regime of Historic Waters Including Historic Bays," A Study prepared by the Secretariat, International Law Commission, U.N. General Assembly, 14th Session, A/CN. 4/143 of 9 March 1962, page 17.
4. Ibid., p. 37-40.
5. Bourquin, "Les Baies Historiques" in Melanges Georges Sauser-Hall (1952), page 43, as quoted on page 43 of A/CN.4/143.
6. Construction lines (of 40 to 48 nautical miles in length) have been applied to Indonesia, the Philippines, Fiji, the Galapagos, Tonga and the Bahamas, "The effects are minimal: In Indonesia, the islands of Sumatra, Borneo, Java, and the Celebes become a 'unit,' if a narrow connection may be declared unitized. The eastern area remains detached and broken. The system works effectively for the remainder of the states although the Philippines straight baselines would not enclose the Sulu Sea. Pragmatically, neither the Philippines nor Indonesia is likely to accept the results of these lines unless the economic-resource zone limits would allocate the residual



areas." From: Bureau of Intelligence and Research, Research Study RGES-3, December 10, 1973, "Islands: Normal and Special Circumstances," (Washington: Bureau of Intelligence and Research), p. 29-30.

## Chapter V

1. From S. Whittemore Boggs, International Boundaries, A Study of Boundary Functions and Problems (New York: Morning-side Heights, 1940). Anthropogeographical boundaries are boundaries related to human occupance of the land. They are drawn according to tribal, linguistic, religious, cultural, or economic criteria.
2. According to Colombos (p. 90-91), "Whether a group of islands forms or not an archipelago is determined by geographical conditions, but it also depends, in some cases, on historical or prescriptive grounds." An example of this is the British claim to jurisdiction over New Guinea and Papua. Covering more than 100 miles from shore to shore, their claim encompasses all the numerous scattered islands which have been generally acknowledged by other nations as forming an archipelago. "A further instance is supplied by the special case of the islands de los Canarios, on the south coast of Cuba, which extend from the Jardines Bank to Cape Frances and comprise an area of over one hundred miles. Within this zone are included some islands, but mainly banks upon which the depth of water is not sufficient to allow of navigation. In this case there can be little doubt that the islands are to be treated as forming an archipelago and that the territorial waters of Cuba run along the exterior edge of the banks."
3. Kusumaatmadja, "Supplementary Remarks," p. 172-173. He goes on to say (page 176), "Some people thought we should create functional zones, one for this and one for that, in order to adopt it to traditional international law. But then we would have a territorial zone, a fisheries zone.---we don't have that many men (to police them)." Later, he says "So I think the archipelagic theory makes sense. The people had to be shown in simple symbols that Indonesia was one. We had just gotten our independence, and we had all these big boys interfering, trying to keep us apart because they had their own designs. So this archipelago principle seemed to be a good thing for the important political unity of Indonesia."
4. Research Study RGES-3, p. 34.

## Chapter VI

1. McDougal and Burke, p. 415.

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APPENDIX I

DRAFT PROPOSALS



FIJI, INDONESIA, MAURITIUS AND PHILIPPINES: DRAFT ARTICLES  
RELATING TO ARCHIPELAGIC STATES

(A/CONF.62/C.2/L.49)

Article 1

1. These articles apply only to archipelagic States.
2. An archipelagic State is a State constituted wholly by one or more archipelagos and may include other islands.
3. For the purpose of these articles an archipelago is a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely inter-related that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.

Article 2

1. An archipelagic State may employ the method of straight baselines joining the outermost points of the outermost islands and drying reefs of the archipelago in drawing the baselines from which the extent of the territorial sea, economic zone and other special jurisdictions are to be measured.
2. The drawing of such baselines shall not depart to any appreciable extent from the general configuration of the archipelago.
3. Baselines shall not be drawn to and from low-tide elevations unless lighthouses or similar installations which are permanently above sea level have been built on them or where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the nearest island.
4. The system of straight baselines shall not be applied by an archipelagic State in such a manner as to cut off the territorial sea of another State as determined under article \_\_\_\_\_ of chapter \_\_\_\_\_ of this Convention.
5. If the drawing of such baselines encloses a part of

the sea which has traditionally been used by an immediately adjacent neighbouring State for direct communication, including the laying of submarine cables and pipelines, between one part of its national territory and another part of such territory, the continued right of such communication shall be recognized and guaranteed by the archipelagic State.

6. An archipelagic State shall clearly indicate its straight baselines on charts to which due publicity shall be given.

### Article 3

1. The waters enclosed by the baselines, which waters are referred to in these articles as archipelagic waters, regardless of their depth or distance from the coast, belong to, and are subject to the sovereignty of, the archipelagic State to which they appertain.

2. The sovereignty and rights of an archipelagic State extend to the air space over its archipelagic waters as well as to the water column and the sea-bed and subsoil thereof, and to all of the resources contained therein.

### Article 4

Subject to the provisions of article 5, ships of all States [whether coastal or not] shall enjoy the right of innocent passage through archipelagic waters.

### Article 5

1. An archipelagic State may designate sealanes suitable for the safe and expeditious passage of foreign ships through its archipelagic waters, and may restrict the passage of such ships, or any types of classes of such ships, through those waters to any such sealanes.

2. An archipelagic State may, from time to time, after giving due publicity there to substitute other sealanes for any sealanes previously designated by it under the provisions of this article.

3. An archipelagic State which designates sealanes under the provisions of this article may also prescribe traffic separation schemes for the passage of such ships through sealanes.

4. In the designation of sealanes and the prescription of traffic separation schemes under the provisions of this article an archipelagic State shall, inter alia, take into account:

(a) the recommendations or technical advice of competent international organizations;

(b) any channels customarily used for international navigation;

(c) the special characteristics of particular channels; and

(d) the special characteristics of particular ships.

5. An archipelagic State shall clearly demarcate all sealanes designated by it under the provisions of this article and indicate them on charts to which due publicity shall be given.

6. An archipelagic State may make laws and regulations, not inconsistent with the provisions of these articles and having regard to other applicable rules of international law, relating to passage through its archipelagic waters, or the sealanes designated under the provisions of this article, which laws and regulations may be in respect of all or any of the following:

(a) the safety of navigation and the regulation of marine traffic;

(b) the installation, utilization and protection of navigational aids and facilities;

(c) the installation, utilization and protection of facilities or installations for the exploration and exploitation of the marine resources, including the resources of the sea-bed and subsoil, of the archipelagic waters;

(d) the protection of submarine or aerial cables and pipelines;

(e) the conservation of the living resources of the sea;



(f) the preservation of the environment of the archipelagic State, and the prevention of pollution thereto;

(g) research in the marine environment, and hydrographic surveys;

(h) the prevention of infringement of the fisheries regulations of the archipelagic State, including inter alia those relating to the stowage of gear;

(i) the prevention of infringement of the customs, fiscal, immigration, quarantine, sanitary and phytosanitary regulations of the archipelagic State; and

(j) the preservation of the peace, good order and security of the archipelagic State.

7. The archipelagic State shall give due publicity to all laws and regulations made by it under the provisions of this article.

8. Foreign ships exercising the right of innocent passage through the archipelagic waters or the sealanes designated under the provisions of this article shall comply with all laws and regulation made by the archipelagic State under the provisions of this article.

9. If any foreign warship does not comply with the laws and regulations of the archipelagic State concerning its passage through the archipelagic waters or the sealanes designated under the provisions of this article and disregards any request for compliance which is made to it, the archipelagic State may suspend the passage of such warship and require it to leave the archipelagic waters by such safe and expeditious route as may be designated by the archipelagic State.

10. Subject to the provisions of paragraph 9 of this article, an archipelagic State may not suspend the innocent passage of foreign ships through sealanes designated by it under the provisions of this article, except when essential for the protection of its security; after giving due publicity thereto and substituting other sealanes for those through which innocent passage has been suspended.

[The foregoing provisions relating to archipelagic States are without prejudice to the regime concerning coastlines deeply indented and cut into and to the waters enclosed by a fringe of islands along the coast.]



PEOPLE'S REPUBLIC OF BULGARIA, GERMAN DEMOCRATIC REPUBLIC  
AND POLISH PEOPLE'S REPUBLIC: AMENDMENTS TO DRAFT ARTICLES  
ON ARCHIPELAGIC STATES CONTAINED IN DOCUMENT A/CONF.62/  
C.2/L.49

Article 1

1. These articles apply only to archipelagic States.
2. An archipelagic State is a State consisting wholly of one or several archipelagos forming a geographical, historical, political and economic entity.
3. All waters within the archipelagic State shall be under its sovereignty and shall be designated as archipelagic waters.
4. The sovereignty of the archipelagic State shall also extend to the airspace over the archipelagic waters and to the surface and subsoil of the sea-bed of such waters. All resources of the archipelagic waters shall be under the sovereignty of the archipelagic State.
5. The archipelagic State shall exercise that sovereignty in accordance with the provisions of the present articles and other rules of international law.

Article 4

All ships shall enjoy equal freedom of passage in archipelagic straits, the approaches thereto, and those areas in the archipelagic waters of the archipelagic State along which normally lie the shortest sea lanes used for international navigation between one part and another part of the high seas.

Article 5

Foreign ships exercising the right of free passage through the archipelagic waters or the sea lanes designated under the provisions of this article shall comply with the relevant laws and regulations made by the archipelagic State under the provisions of this article.

All ships passing through the straits and waters of archipelagic States shall not in any way endanger the security of such States, their territorial integrity or political independence. Warships passing through such straits and waters may not engage in any exercises or gunfire, use any form of weapon, launch or take on aircraft, carry out hydrographic surveys or engage in any similar activity unrelated to their passage. All ships shall inform the archipelagic State of any damage, unforeseen stoppage, or of any action rendered necessary by force majeure.

An archipelagic State may not interrupt or suspend the transit of ships through its straits or archipelagic waters, or take any action which may impede their passage.

## THE U.K. PROPOSAL

### RIGHTS AND OBLIGATIONS OF ARCHIPELAGIC STATES

1. On ratifying or acceding to this Convention, a State may declare itself to be an archipelagic State where:

- (a) the land territory of the State is entirely composed of 3 or more islands; and
- (b) it is possible to draw a perimeter, made up of a series of lines or straight baselines, around the outermost points of the outermost islands in such a way that:
  - (1) no territory belong to another State lies within the perimeter, [Sic]
  - (11) no baseline is longer than 48 nautical miles, and
  - (111) the ratio of the area of the sea to the area of land territory inside the perimeter does not exceed five to one:

Provided that any straight baseline between two points on the same island shall be drawn in conformity with Articles . . . of the Convention (on straight baselines).

2. A declaration under paragraph 1 above shall be accompanied by a chart showing the perimeter and a statement certifying the length of each baseline and the ratio of land to sea within the perimeter.

3. Where it is possible to include within a perimeter drawn in conformity with paragraph 1 above only some of the islands belonging to a State, a declaration may be made in respect of those islands. The provisions of this Convention shall apply to the remaining islands in the same way as they apply to the islands of a State which is not an archipelagic State and references in this article to an archipelagic State shall be construed accordingly.

4. The territorial sea, [Economic Zone] and any continental shelf of an archipelagic State shall extend from the outside of the perimeter in conformity with Articles . . . of this Convention.



5. The sovereignty of an archipelagic State extends to the waters inside the perimeter, described as archipelagic waters: this sovereignty is exercised subject to the provisions of these Articles and to other rules of international law.

6. An archipelagic State may draw baselines in conformity with Articles . . . (bays) and . . . (river mouths) of this Convention for the purpose of delimiting internal waters.

7. Where parts of archipelagic waters have before the date of ratification of this Convention been used as routes for international navigation between one part of the high seas and another part of the high seas or the territorial sea of another State, the provisions of Articles . . . of this Convention apply to those routes (as well as to those parts of the territorial sea of the archipelagic State adjacent thereto) as if they were straits. A declaration made under paragraph 1 of this Article shall be accompanied by a list of such waters which indicates all the routes used for international navigation, as well as any traffic separation schemes in force in such waters in conformity with Articles . . . of this Convention. Such routes may be modified or new routes created only in conformity with Articles . . . of this Convention.

8. Within archipelagic waters, other than those referred to in paragraph 7 above, the provisions of Articles . . . (innocent passage) apply.

9. In this Article, references to an island include a part of an island and reference to the territory of a State includes its territorial sea.

10. The provisions of this Article are without prejudice to any rules of this Convention and international law applying to islands forming an archipelago which is not an archipelagic State.

11. The depositary shall notify all States entitled to become a party to this Convention of any declaration made in conformity with this Article, including copies of the chart and statement supplied pursuant to paragraph 2 above.

12. Any dispute about the interpretation or application of this Article which cannot be settled by negotiations may be submitted by either party to the dispute to the procedures for the compulsory settlement of disputes contained Articles . . . of this Convention.



APPENDIX II

GRAPHIC COMPARISONS

FIGURE 7

COMPARISON OF INDONESIA AND THE UNITED STATES

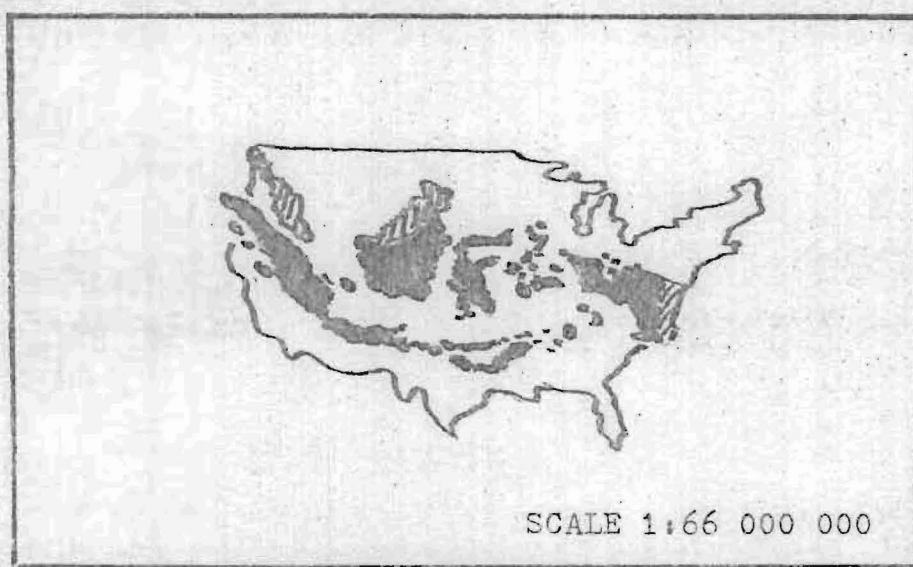
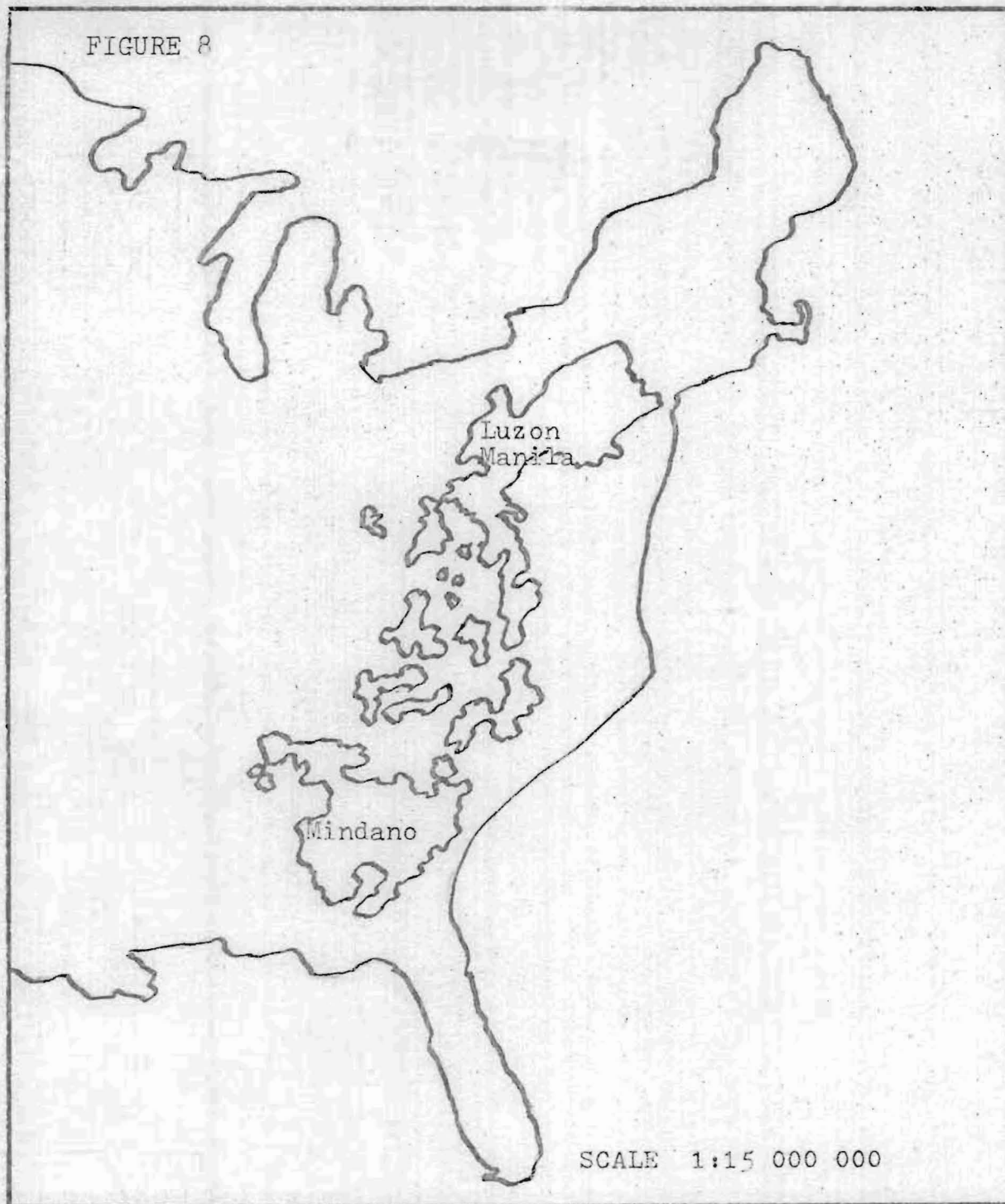


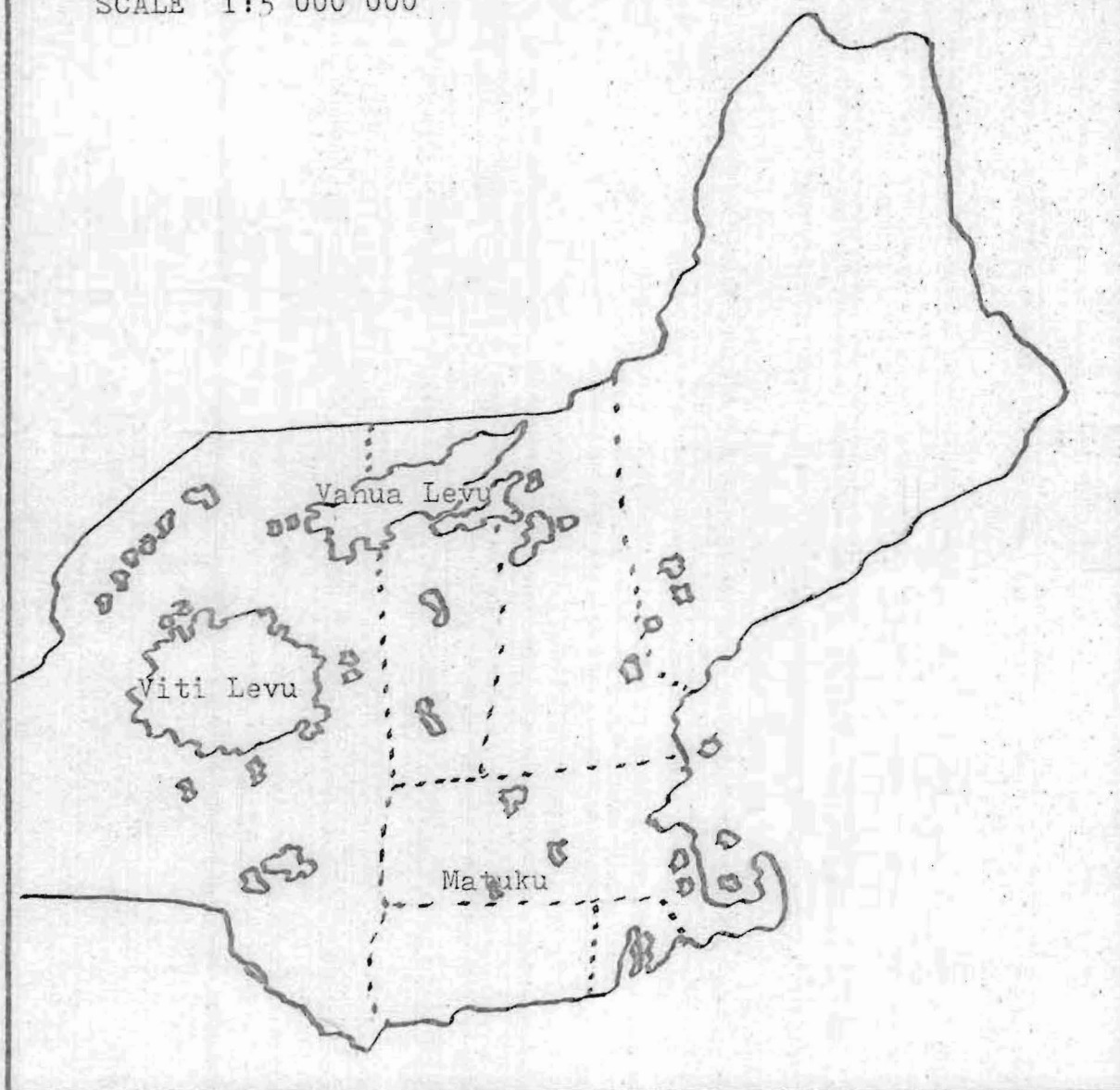
FIGURE 8



COMPARISON OF THE PHILIPPINES AND THE UNITED STATES

FIGURE 9

SCALE 1:5 000 000



COMPARISON OF FIJI AND NEW ENGLAND